

DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE:

B-221085

DATE: January 28, 1986

MATTER OF:

Designware, Inc.

DIGEST:

1. Protest is timely where it was filed within 10 working days after protester learns of agency's decision to cancel solicitation. Notification to protester that cancellation was under consideration is not sufficient to apprise protester of the basis for protest.
2. Cancellation after bid opening is proper where agency reasonably determined that the solicitation did not reflect the agency's actual needs.

Designware, Inc. protests the cancellation of invitation for bids (IFB) No. DE-FB04-85-A132134 issued by the Department of Energy (DOE) for twenty removable hard disc media. The firm also protests DOE's determination that its bid was nonresponsive.

We deny the protest.

The IFB was issued on August 2, 1985 and specified a bid opening date of September 4. At bid opening, eight bids were received and after an initial review, Designware was determined to be the apparent low bidder.

Although not required by the IFB, Designware included descriptive literature with its bid. DOE states that a further review of Designware's bid showed that the firm had not specifically responded to sixteen equipment specifications and that an examination of the literature submitted indicated that only eight of these sixteen requirements had been addressed. In addition, DOE discovered that the literature submitted specified that the removable hard disc will have an access time of 90 Mseconds or better whereas the IFB required an access time of 80 Mseconds or better.

DOE concluded that Designware's bid was nonresponsive and states that Designware was orally notified of this finding on September 10. The remaining bids were evaluated

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and while several were found responsive, a determination was made to cancel the IFB and resolicit due to the need for revised specifications and quantities. DOE states that additional training for the installation and maintenance of the hard discs will be required and that additional testing equipment will be needed. Also, DOE concluded that mounting the hard discs externally, rather than internally as required by the current IFB, would increase the flexibility of use and decrease the time required for maintenance.

Designware protested to DOE the rejection of its bid as nonresponsive and the firm argues that the requirement changes were developed by DOE in response to the protest in an attempt to deny Designware any meaningful relief. In this regard, Designware contends that there are discrepancies between the rationale for cancellation contained in the agency's written Determination and Findings (D&F) and the contracting officer's statement in the agency's protest report. For example, Designware indicates that the D&F states that the additional equipment is needed for maintenance purposes while the contracting officer's statement indicates that the additional equipment is needed to ensure the interchangeability of the hard disc drives and cartridges. Also, Designware points to the statement in the agency report which says that DOE determined that changes to the IFB were necessary "after the IFB was published" and complains that DOE should have issued an amendment or canceled the IFB prior to bid opening. Since this was not done, Designware argues that the changes could not have been "compelling."

Initially, DOE argues that Designware's protest concerning the cancellation of the IFB is untimely. DOE notes that Designware admits that the firm was advised during an October 10 conversation that DOE was considering canceling the IFB and that this advice apprises Designware of the basis for its protest. Since Designware's protest was not filed until November 15, DOE argues that it is untimely and should not be considered.

Designware contends that it was not informed that the IFB would be canceled but only that DOE was reviewing the matter to decide whether there were sufficient grounds for cancellation. Designware states that it was not informed that the IFB would be canceled until November 5 and that its protest was filed within 6 working days of that notification.

Although Designware was apparently told that the cancellation of the IFB was under consideration, the firm was entitled to await the agency's final decision prior to protesting. In addition, the record shows that final approval for the decision to cancel was not made until October 28 and that notices of this action were not sent until November 5. Designware's statement that it was not notified of DOE's final decision until November 6 is consistent with these facts and although the parties disagree as to what was said in earlier conversations, we resolve doubt surrounding the timeliness of a protest in favor of the protester. Builder's Security Hardware, Inc., B-213599.2, Feb. 15, 1984, 84-1 CPD ¶ 207. Accordingly, we will consider the merits of the protest.

Because of the potential adverse impact on the competitive bidding system of cancellation after bid prices have been exposed, a contracting officer must have a compelling reason to cancel an IFB after bid opening. Federal Acquisition Regulation (FAR) § 14.404-1 (FAC 84-5, Apr. 1, 1985); Aul Instruments, Inc., B-219992.2, Sept. 20, 1985, 85-2 CPD ¶ 315. As a general rule, changing the requirements of a procurement after the opening of bids to express properly the agency's minimum needs constitutes such a compelling reason. Dyneteria, Inc., B-211525.2, Oct. 31, 1984, 84-2 CPD ¶ 484. In considering cases involving cancellations, we recognize that the contracting officer has broad discretion to decide whether there is a compelling reason to cancel, and we limit our review to determining whether the exercise of that discretion is reasonable. Hoyer Construction Co., Inc., B-216825, Feb. 13, 1985, 85-1 CPD ¶ 194.

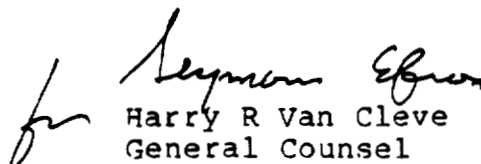
We cannot conclude that DOE acted unreasonably here. DOE reviewed the solicitation and found that a change in the hard disc configuration was required and that additional training for installation and maintenance as well as additional testing equipment is needed to meet the agency's actual needs. Although Designware argues that there are discrepancies between the justifications advanced by the contracting officer and the rationale contained in the agency's D&F, there is no disagreement that the IFB requirement that discs be mounted internally no longer reflects the agency needs and that additional testing equipment, whether for maintenance purposes or for testing the interchangeability of the hard discs and cartridges, is needed. In addition, to the extent differences exist between the bases originally advanced by DOE and those now asserted by the contracting officer, we point out that a subsequently raised

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basis for cancellation, which would have supported cancellation had it been advanced originally, is acceptable. John C. Kohler Co., B-218133, Apr. 22, 1985, 85-1 CPD ¶ 460. Since the solicitation no longer accurately represented DOE's needs, we conclude that the contracting officer's decision to cancel the IFB was not improper.

Furthermore, the record does not support Designaware's assertion that DOE knew of the changed requirements prior to bid opening. The Executive Summary of DOE's actions, contained in the agency report, states that the requiring activity found that the requirements had changed after bid opening and a post-bid opening memorandum of that same activity, dated October 1, indicates that recent new requirements for the equipment solicited have been identified which will not be satisfied by the current IFB. Although discussions among agency personnel concerning this requirement may have occurred after the IFB was published, there is no evidence which suggests that DOE was aware that the current IFB would not satisfy its needs prior to bid opening.

Finally, whether Designaware's bid is responsive is irrelevant since an award under the IFB would not have met the agency's needs. American Marine Decking Systems, Inc., B-216580, Mar. 1, 1985, 85-1 CPD ¶ 256. We therefore find the cancellation proper, and we deny the protest.


Harry R Van Cleve
General Counsel